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(35536)

IN THE

Supreme Court of the United States

October Term, 1958

No. 294

JOHN E. STEINBECK,

Appellant,

against

LAWRENCE E. GEROSA as Comptrolier of the City of New York, and GEORGE M. BRAGALINI as Treasurer of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York dated May 1, 1958, unanimously affirming an order of the Appellate Division of the Supreme Court of that State.

The opinion of the Court of Appeals is officially reported in 4 NY 2d 302 and is set forth in Appendix A of the appellant's statement as to jurisdiction. The decision of the Appellate Division is officially reported in 4 AD 2d 855.

By this appeal, appellant challenges the constitutional validity of the New York City General Business and Financial Tax as applied to him. The tax, by its terms, is applied to any person carrying on within the City of New York

"any trade, business, profession, vocation or commercial activity" so long as the gross receipts therefrom exceed $10,000 per annum. Appellant contends that the freedom of press provision of the First Amendment and the Fourteenth Amendment of the United States Constitution bar the imposition of such a tax on authors.

Appellant also contends that he is engaged in interstate and foreign commerce and that, therefore, Article 1, Section 8, of the United States Constitution bars local taxation of his receipts or, alternatively, requires such taxation to be on an allocated basis.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes Involved

The law imposing the tax is set forth in Appendix C of the appellant's statement as to jurisdiction.

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul and correct a determination of the Comptroller of the City of New York denying a refund of general business taxes paid for the period between January 12, 1943 and June 30, 1950, during which appellant was concededly a resident of New York City.

The determination under review here was made as the result of a hearing held by the Comptroller of the City of New York at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing and both sides introduced testimony at the hearing.

Under the practice in New York the administrative hearing constitutes the trial of the issues in the case (Civil Practice Act, Article 78). The determination issued in this case as a result of the hearing was first reviewed by the Appellate Division, First Department, which unanimously confirmed it. Upon appeal by appellant to the Court of Appeals of the State of New York that Court unanimously affirmed.

Facts

I

Appellant is a famous author of novels, plays, motion picture scripts, magazine articles and other literary works. He was concededly a resident of New York City during the period for which he paid the taxes under review (fols. 103, 118-122). During these periods he wrote numerous novels, motion picture scripts, plays, newspaper and magazine articles, and radio scripts (fols. 166-168, 366, 502-508, Respts. Exh. D). Appellant did research for his writings and checked and edited the proofs of his writings in New York City (fols. 158-159, 255-257, 266, 419). Correspondence with respect to his literary works was received by him in the City (fol. 255). Through his agent, appellant negotiated in New York City for the sale of his rights to his literary works (fols. 199, 347-349). The record shows that during these periods appellant executed contracts in New York City for the sale of his rights to seven motion picture scripts, three books and two plays (fols. 502, 503, 505-507).

II

Respondents' exhibits D, H and I exemplify the kind of contracts appellant executed in New York City. Those covering books provided that appellant was to be paid a percentage of the amount charged by the publisher for all

copies sold, less copies returned, but with "no deduction for cash discounts or bad debts" [Respts. Exh. D, "A Russian Journal", (par. 4)]. Those covering other works provided either wholly or in part for the payment of a lump sum to appellant (Respts. Exh. D, "Contract for Purchase of Manuscript"; *id.* Option Agreement, "Viva Zapata", par. Fourth; Respts. Exh. H, "Of Mice and Men", par. Thirteenth; fol. 446). All of the contracts purported to sell petitioner's rights in his literary works.

Aside from their use as a measure of the payment for the sale of his rights, appellant had no interest, direct or indirect, in the sale of copies of his books, plays, articles or scripts. He did not control or participate in any way in these transactions of sale which involved only the publishers or producers who had purchased his rights from him (fols. 394, 400-401, 406-412, 432-435).

III

Since 1932, the New York City firm of McIntosh and Otis, Inc. has been appellant's sole literary agent (fols. 122, 354). McIntosh and Otis, Inc. had complete authority to act on appellant's behalf in all matters relating to and arising out of the contracts for the sale of appellant's rights in his literary works (Respts. Exh. D, "A Russian Journal", par. 14A; *id.*, Option Agreement, "Viva Zapata", par. 4(b); *id.* Contract re "Viva Zapata", par. Thirteenth). The New York City agent received all of appellant's manuscripts, negotiated the sale of appellant's rights thereto and often executed contracts as his attorney-in-fact (fols. 348-349).

In addition, the New York City agent handled all of appellant's business correspondence, kept a file of his contracts and correspondence, received financial statements of receipts earned by appellant, registered his copyrights,

deposited his receipts in a New York City bank account, and recorded and paid his expenses for professional dues, stationery, telephone, telegraph, reference bo[illegible]s, theatre and airline tickets and "cleaning office" (fols. 358-361, 370, 373-374, 376, 378, 380-381, 383, 469-473, 479; Respts. Exh. G. entry of Dec. 30, 1948; Respts. Exh. E).

Appellant's federal income tax returns were prepared by his attorneys from information supplied by McIntosh and Otis, Inc. (fols. 269, 448, 465, 467). These returns treated the receipts taxed herein as "profit from profession" (Respts. Exhs. E and F).

All of these activities by his agent in New York City were best characterized by appellant himself. He referred to McIntosh and Otis, Inc. as "my business associates" (fol. 239). He emphasized that their activities were continuous on his behalf and that they did whatever was "necessary in the business of publishing manuscripts" (fols. 124, 248, 253).

IV

It should be noted that originally the final determination included receipts from the sale of rights to literary works written prior to the date that appellant became a New York resident. By stipulation of settlement between the parties, the tax attributable to those receipts has been eliminated from this proceeding. This reduced the amount of tax in controversy for the 7½ years involved to $531.09, together with $133.73 interest, making a total of $664.82.

POINT I

The claim that the First and Fourteenth Amendments to the United States Constitution bar the application of the New York City General Business and Financial Tax to authors presents no substantial Federal question.

I

Appellant is a writer of novels, plays, magazine articles and motion picture scripts. It is contended on his behalf that these activities, from which he earns his entire livelihood, cannot be subjected to a general gross receipts tax without violating the constitutional guarantee of freedom of the press. There is no doubt that the protection of this constitutional provision extends to the petitioner's writings, but the construction which the petitioner seeks has never been applied to the business of publishing a newspaper which more essentially involves freedom of the press than does the writing of novels.

General taxes have been applied to the press from early times without any successful challenge to their constitutionality. *In re Jager,* 29 S. C. 438, 7 S. E. 605, 609 (1888); *Preston* v. *Finley,* 72 Fed. 850 (Cir. Ct., Tex., 1896); *City of Norfolk* v. *Norfolk Landmark Pub. Co.,* 95 Va. 564, 28 S. E. 959 (1898); *Giragi* v. *Moore,* 48 Ariz. 33, 58 P. 2d 1249 (1936); 49 Ariz. 74, 64 P. 2d 819 (1937), *app. dism. for want of substantial federal qn.* 301 U. S. 670 (1937); *Arizona Pub. Co.* v. *O'Neil,* 22 F. Supp. 117 (D. Ct., Ariz., 1938), affd. 304 U. S. 543 (1938); *Tampa Times Co.* v. *City of Tampa,* 158 Fla. 589, 29 So. 2d 368 (1947), *app. dism. for want of a substantial federal qn.* 332 U. S. 749 (1947); *City of Corona* v. *Corona Daily Independent,* 115 Cal. App. 2d 382, 252 P. 2d 56 (1953), *cert. den.* 346 U. S. 833 (1953); *Alaska* v. *Journal Printing Company,* 135 F. Supp. 169 (D. Ct., Alaska, 1955).

These cases furnish a complete answer to the appellant's contention. In at least three of these cases this Court passed upon the constitutional issue and upheld the tax. These three cases— the *Giragi* case, the *Arizona Pub. Co.* case and the *Tampa Times Co.* case—all involved privilege taxes measured by gross receipts. Thus, they are squarely in point.

It is clear from these cases that the freedom of the press guarantee was not intended to exempt writers or publishers of newspapers, magazines or novels from ordinary revenue measures for the support of the government.

While the three cases in which this Court upheld privilege taxes dispose of the petitioner's argument that a privilege tax may not be imposed on him, we wish to note briefly that petitioner's analogy to privilege taxes under the Commerce Clause is unsound. The free press guarantee limits both the federal government and the states in exactly the same way. The Commerce Clause restriction applies to the states alone, and it rests on the fact that the power to regulate commerce among the states has been granted to the federal government. The Commerce Clause cases merely hold that the states cannot tax the privilege of engaging in interstate commerce because, as stated in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), at page 608:

> "They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce * * *."

II

The case of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), illustrates the kind of tax on the press which is constitutionally objectionable. In the *Grosjean* case, the Court struck down a gross receipts tax which was imposed solely on newspapers having a large circulation. It was

shown that the real objective of the tax was to suppress newspapers hostile to the incumbent administration.

The Court made it plain that it was not holding that there is a bar against taxing newspapers, saying (p. 250):

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of government."

The opinion went on to explain that the tax was being struck down because it was a deliberate device to limit the circulation of information (pp. 250-251).

The clarity with which the Court explained the basis of its determination leaves no ground for the suggestion that an ordinary gross receipts tax may not be applied to the press. Any doubts which might have arisen were completely dispelled by subsequent cases in which this Court upheld such taxes or, in effect, upheld them by dismissing on the ground that no substantial federal question was involved. *Giragi* v. *Moore*, 301 U. S. 670 (1937); *Arizona Pub. Co.* v. *O'Neil*, 304 U. S. 543 (1938); *Tampa Times Co.* v. *City of Tampa*, 332 U. S. 749 (1947). See also, *City of Corona* v. *Corona Daily Independent*, 346 U. S. 833 (1953). See *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 194 (1946).

The tax involved in the case at bar applies, not only to writers and publishers, but to all businesses, professions, trades, vocations and commercial activities. It is measured by gross receipts and applies to all without discrimination. Thus, it is a general tax and one which is not, in any sense, aimed at the press or at writers.

III

Appellant finds some superficial support in a few statements made in the majority opinions in several Jehovah's Witnesses' cases decided on a 5-4 basis. *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943). All of these cases involved flat license taxes which were applied by municipalities to members of the sect who, in the course of propagating their religion, sold religious tracts and books or, at times, gave them away. The applications of the taxes under these circumstances were held to be unconstitutional as violative of the First and Fourteenth Amendments.

Although the emphasis in these opinions is upon freedom of religion, there is also discussion of principles applicable to all First Amendment freedoms. In essence these come down to statements that a tax may not be laid specifically upon these freedoms; that a charge may not be made for the enjoyment of a right granted by the federal constitution; that a flat license tax applied to rights guaranteed by the First Amendment would have destructive effect; and that the power to tax the exercise of a privilege is the power to suppress or control its enjoyment.

These statements, when read out of context, give surface support to the appellant's contention. It must be remembered, however, that they were uttered with regard to a flat license tax on the right of itinerant preachers to distribute religious literature for which a small charge usually was made. And the opinions emphasize the prior restraint.

Moreover, at least one of these opinions cited, without criticism, the *Giragi* case which had upheld a privilege tax upon newspapers measured by its gross receipts [see Justice MURPHY's dissent in *Jones* v. *Opelika*, 316 U. S. 584,

619 (1942), which became a majority opinion in *Jones* v. *Opelika*, 319 U. S. 103 (1943)].

In addition, the opinions emphasized the non-commercial nature of the activities involved in the cases before the Court. In *Jones* v. *Opelika*, 316 U. S. 584, Mr. Justice MURPHY pointed out that (p. 619):

> "Petitioners were not engaged in a traffic for profit."

He later said that the limitations stated with regard to taxes on freedom of speech and freedom of the press applied where there was "no thought of commercial gain" (p. 621). See, also, Chief Justice STONE's opinion in the same case (316 U. S., at p. 604); *Murdock* v. *Pennsylvania*, 319 U. S., at p. 111. *Cf. Follett* v. *McCormick*, 321 U. S., at p. 576.

Any uncertainty concerning the scope of the decisions in these Jehovah's Witnesses' cases was soon clarified. In *Tampa Times Co.* v. *City of Tampa*, 332 U. S. 749 (1947), this Court refused to review a determination which upheld a privilege tax, measured by gross receipts, on the ground that no substantial federal question was involved.

In *Breard* v. *City of Alexandria*, 341 U. S. 622 (1951), an ordinance forbidding peddlers and canvassers from calling upon occupants of private residences was held valid as to canvassers for magazine subscriptions. The Court said (p. 642):

> "We agree that the fact that the periodicals are sold does not put them beyond the First Amendment. The selling, however, brings into the transaction a commercial feature."

Mr. Justices BLACK and DOUGLAS dissented, and asserted that the Jehovah's Witnesses' cases were being overruled.

Thereafter, in *City of Corona* v. *Corona Daily Independent*, 346 U. S. 833 (1953), certiorari was denied although the State court had upheld a flat license tax as applied to a newspaper (115 Cal. App. 2d 382, 252 P. 2d 56). Justices BLACK and DOUGLAS dissented from the denial of certiorari, emphasizing that the tax was the flat license type. It seems clear that a privilege tax measured by gross receipts does not violate the freedom of the press guarantee. Certainly, in light of the cases, it is evident that such a tax may be imposed upon an author who earns his livelihood from his writings. The fact that appellant is an eminently gifted writer does not make his activities non-commercial. In fact, the quality of his work enhances his earnings.

Appellant insists that the *Tampa Times* and *City of Corona* cases did not involve taxes which were privilege taxes "in substance as well as in form" (Jurisdictional Statement, p. 11). There is, however, not the slightest basis for suggesting that the tax in the case at bar is any more a privilege tax in substance than the taxes in those cases. It also, to use the words of the California court in the *Corona* case, "does not grant or take away any right to do business, does not subject business to withdrawal or control by the city, is not regulatory in any manner."

After noting this resemblance between the two taxes, the New York Court of Appeals characterized the tax here in issue as follows (4 NY 2d, at p. 315):

> "Its sole object is revenue notwithstanding the fact that the tax is styled a 'privilege tax.'"

POINT II

The claim that Article I, Section 8, of the United States Constitution requires an allocation of the tax imposed on appellant presents no substantial Federal question.

I

While appellant contends that Article I, Section 8, of the United States Constitution bars the imposition upon him of the tax under review, the only argument he advances is in support of a contention that such a tax must be allocated.

As the Court of Appeals of New York pointed out, appellant himself is not engaged in interstate or foreign commerce (4 NY 2d, at pp. 316-318). His literary works were sold and performed in other states and in foreign countries, but such sales and productions were made by his publisher and licensees of his publisher. Appellant had no property rights in the books or magazines sold by the publishers, nor in the films made by motion picture companies. The fact that the consideration paid to him was, at times, based on a percentage of his publisher's receipts did not make appellant a joint adventurer with the publisher. As the Court of Appeals said (4 NY 2d, at pp. 317-318):

> "An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses* * * *. An agreement to distribute the proceeds of an enterprise upon a percentage basis does not represent a joinder of property, skills and risks * * *.
>
> * * * * *

The sums payable to petitioner by way of royalties were merely the price for the licensing of certain of his literary rights. The sales made by the publishers and the gross receipts from the motion pictures were simply the means by which the price for the licensing of Mr. Steinbeck's literary rights were ultimately to be determined. The relationship between an author and a publisher is not that of joint venturers merely because the publisher is to pay the author on the basis of receipts from the sale of books. On the contrary, it must be said that the *source* of Mr. Steinbeck's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City (see *Ingram* v. *Bowers*, 57 F. 2d 65)." (Italics the Court's.)

II

In support of his Commerce Clause argument, the appellant cites two cases (Jurisdictional Statement, p. 16). Both of the cases involved stevedoring and in one of these cases this Court pointed out that the business of loading and unloading vessels moving in interstate or foreign commerce is "essentially a part of the commerce itself." *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 433 (1947). This immunity from local taxation does not apply, however, simply because a local business or occupation contemplates that foreign commerce will ensue or is related to foreign commerce or is even necessary to foreign commerce. *Nathan* v. *Louisiana*, 49 U. S. 73 (1850) (brokers in foreign exchange); *Puget Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90, 94 (1937) (business of furnishing stevedores for hire); *Canton R. Co.* v. *Rogan*, 340 U. S. 511 (1951) (renting of cranes to unload vessels); *Western Maryland R. Co.* v. *Rogan*, 340 U. S. 520 (1951) (transportation of exports and imports to and from a port).

CONCLUSION

The appeal to this Court from the order of the Court of Appeals of the State of New York should be dismissed.

September 2, 1958.

Respectfully submitted,

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